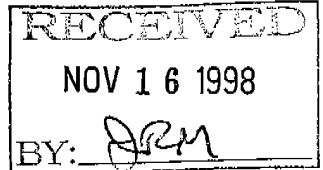


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16 November 1998

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Gentlemen:

HEADWATERS FOREST AND PALCO PROPERTIES, PERMIT NUMBERS PRT-828950 AND 1157,
SYP 96-002

The purpose of this letter is to provide comments on the two documents:
1) "Headwaters Habitat Conservation Plan/Sustained Yield Plan" (hereafter HCP), undated, as found on website <http://ceres.ca.gov> on 11 November 1998, and 2) "Draft Environmental Impact Statement/Environmental Impact Report for the Headwaters Forest Acquisition and the PALCO Sustained Yield Plan and Habitat Conversation Plan" (hereafter EIS), dated October 1998. Because of the overlapping content and concerns regarding both documents, the following comments apply to both documents. Abbreviations used herein are consistent with those used in the HCP and EIS.

1. The HCP and EIS are not meaningful documents and should not be approved if there is doubt that they can be fulfilled. PALCO should not be allowed to harvest timber or permitted to further the loss of endangered species if the plans cannot or will not be fulfilled. Fulfillment is conditioned on assuming that 1) PALCO can be reasonably expected to make a good-faith effort to abide by the documents, including all conditions and specified mitigation measures, 2) PALCO follows the documents according to their intent without attempting to evade the intent through unintended loopholes or situations unforeseen in the approved documents, 3) the regulatory agencies have the authority, intent, and resources to monitor and enforce compliance with the documents, 4) the documents incorporate monitoring activities to detect whether the stated outcomes will in fact occur if the specified conditions are fulfilled, and 5) the documents can be modified at a later date if the specified conditions are not going to achieve the outcomes favorably. In all respects these

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conditions of fulfillment cannot or are unlikely to be met, as noted further in Comments 2-6.

2. PALCO under the ownership of Maxxam Corporation has demonstrated a patent disregard of the Forest Practice Rules and conditions of its permits for logging and environmental protection. It has received about 300 citations from the CDF in the past three years. It has had its license suspended twice. The most recent suspension occurred when it would be expected that PALCO would be on its best behaviour in order to receive approval of the HCP and EIS. Furthermore, the most recent suspension occurred as a result of willful concealment of violation of the applicable permit or law. Maxxam and its principal stockholder and CEO Charles Hurwitz have a history of not fulfilling obligations in their business practices. As a result of failure of United Savings Association of Texas (USAT), controlled by Maxxam, due to improper, if not illegal, practices, including investing in junk bonds, depositors and others lost \$1.6 billion, of which the federal government has been left with obligations of over \$500 million. The purchase of PALCO by Maxxam was accomplished with more junk bonds, with the intent of abandoning the responsible timber practices of the previous PALCO owners and making quick profits by wholesale stripping of the forest, including all old-growth trees. There is no confidence that once Maxxam has achieved its purpose of profit-taking, it will maintain ownership of PALCO and long-term fulfillment of the conditions of the HCP and EIS. Maxxam and Hurwitz will likely abandon PALCO and its obligations in the same way as it has abandoned the people who deposited their savings in USAT and left the debris for the federal government and taxpayers.

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As a basis for determining whether PALCO has already exhibited a pattern of behaviour that would warrant denial of further permission for harvesting and rejection of the HCP and EIS as unlikely to be fulfilled, the EIS should provide a list of PALCO's past timber and environmental violations and what penalties and enforcement resulted. These data are just as relevant as technical data in determining the effects of the proposed plan.

3. Given the pattern of violation of explicit rules and permit conditions, it cannot be expected that PALCO intends to fulfill the spirit of the HCP and EIS. It surely will exploit any unforeseen circumstances or resist environmental protections that need to be added later due to issues left unresolved in the current documents.
4. The agencies responsible for enforcement of the HCP, EIS, and other laws and regulations, while ultimately resting with CDF, also include the State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards, the Department of Fish and Game, and the county of jurisdiction. All have review, monitoring, and enforcement authorities. Under current funding limitations, the North Coast Regional Water Quality Control Board (RWQCB) does not have the resources to adequately provide review of proposed timber harvests or to monitor ongoing operations for impacts on water quality or beneficial uses of streams, such as maintaining fisheries. The RWQCB is able to participate in only about ten percent of pre-harvest inspections. A similar lack of resources is likely for the other agencies involved.

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On-site monitoring by regulatory agencies is essential to ensure enforcement of requirements because PALCO has shown a pattern of violating requirements when unsupervised. For example, a CDF Forester reported on THP 96-574, "After a series of high level meetings, open forums, discussions, etc, we still are having problems with compliance

with winter rules on this ownership[. It is common to find that violations occur and the cessation of trucking only occurs when CDF arrives on site and points out sedimentation of Class III and Class II watercourses. The LTO's are quick to terminate operations when notified of the violations, but it is my growing experience that the cessation of hauling depends on CDF's presence on site, not through monitoring by LTO's. . . . Using my personal experience as my guide, I would resist all proposed winter operations on this ownership due to the high incidence of road related violations noted on active inspections." Neither CDF nor other agencies have the staff to patrol PALCO's logging operations full time.

The statutory provisions for appealing decisions of CDF regional directors or the agency director do not allow enough time to reasonably document and file appeals. For example, DFG and the RWQCB can appeal an approval of a THP by the CDF director only if the agency participated in both the pre-harvest field inspection and in the interagency review team review. Furthermore, the agencies have only ten total days, including weekends, to prepare an appeal. The RWQCB does not receive notice of the decision until several days have passed after the decision. For the RWQCB, the appeal must be documented and receive internal agency reviews through several chains of command in both the RWQCB and the SWRCB. Because of the limited time and restrictions, the SWRCB never attempts to appeal CDF decisions with which it disagrees.

There also is a lack of authority or intent to enforce adequately environmental protections. For example, in many instances the RWQCB files notices of nonconcurrence with proposed timber harvest plans because the CDF disregards the advice of the RWQCB. There are reports of CDF field staff refusing to verify reported violations by PALCO or of inspecting alleged violations days after the report and the damage have occurred, making it impossible to document properly the violations. The County of Humboldt routinely does not participate in the interagency review team that reviews proposed timber harvest plans. Apparently, protecting the environment and the long-term economy of the county is not of major concern to the county government. The county has also shown little interest in taking legal action against PALCO for violations of law. When PALCO is convicted of violations, the citations or fines are not sufficient deterrence to enforce compliance. For example, the maximum fine for a violation is only \$1,000. The profits from the illegally harvested timber far exceed such fines. In May 1998, PALCO was convicted of FPR violations. PALCO chose to pay a \$13,000 fine rather than accept conditions of probation.

If current laws, funding, and agency intent do not provide for a framework for monitoring and enforcement of the conditions of the HCP or EIS, they should not be approved.

5. The HCP and EIS do not have adequate baseline data to document further damage to the environment as a result of continued logging by PALCO. For example, the HCP acknowledges that there has not been a comprehensive, properly designed survey of the entire study area for the endangered marbled murrelet, not even the habitat assumed in the HCP. Thus, the projected take is based on unfounded assumptions that appear to be biased guesses. Out of 1011 miles of Class I and II watercourses, there are only 52 permanent monitoring stations with limited data (HCP, v. II, Part F). Apparently Class III watercourses have not been monitored at all for impacts of logging. The documents also do not specify future monitoring criteria and commitments to document whether the projected effects on water quality, erosion and sedimentation, wildlife habitat, and losses to

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wildlife are accurate and to provide a basis of reassessing the logging restrictions in the future should the effects become more detrimental than predicted.

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6. The incidental take permits in conjunction with the "No Surprises" Rule appear to limit the ability to modify the permits should the baseline assumptions be found wrong, new information be acquired on the status of sustainability or habitat needs of species, or species take during the life of the permits begin occurring more rapidly than estimated in the HCP. It is unclear whether other approvals and permits associated with the subject documents can be amended to reflect deficiencies that are determined during the implementation of the HCP. See comment 7.
7. There seems to be a conflict in the documents regarding whether and under what conditions prescriptions in the HCP or EIS can be modified. Under the apparent restrictions of the No Surprises rule, changes can be mandated only under Changed Conditions as specified in the HCP, v. IV, Part H (Draft Implementation Agreement, HCP, v. VI, Part D, Section 6.1.6). Part H covers very limited circumstances and is written in such a way as to imply that landslide and other damage is such a common natural occurrence that it should rarely be blamed on PALCO's silvicultural practices. Hillside erosion and stream sedimentation are not addressed. Also not addressed are increased takes of Covered Species from the levels predicted in the HCP and, therefore, assumed as the basis for ITP approval, or increased damage to habitat for these and other species than was predicted. Yet, the EIS states that the prescriptions in Appendix E may be modified as a result of a completed watershed analysis (p. 2-28). Does this mean that they can only be modified to be more lenient and never more restrictive, regardless of how erroneous the baseline data and predictions in the HCP?
8. When there are significant uncertainties in data, assumptions, or projection models, it is essential to perform sensitivity analyses over the range of uncertainties to test and compare the outcomes. In the case of this HCP and EIS, such uncertainties abound. Yet, the only data used for discussion and comparison of alternatives are those based on PALCO's HCP, which has biased all data, assumptions and projection models in favor of the Proposed Action. Other professional and scientific opinions have been disregarded. It is especially irresponsible for government decisions to be based on this biased source without a sensitivity analysis.
9. Because of the uncertainties in the data and assumptions used to predict the take of species and other environmental impacts and because of the legal constraints to adding further mitigation measures later, it is essential that very conservative assumptions be made from the perspective of protecting the environment. There is more latitude to weaken requirements later based on better scientific documentation. Rather than accepting the data in the HCP as a basis of decision-making, worst case assumptions should be made and new forecasts of impacts on species and the environment made.
10. A method of harvesting or use of harvesting equipment should not be allowed in the HCP or EIS if there is 1) a high probability that it cannot be accomplished under specified conditions to prevent adverse consequences or 2) a risk of substantial harm to the environment if a violation of the specified conditions occurs. Clearcutting is a practice that fits both of these conditions and should be prohibited. PALCO's record of violations, including violations of clearcutting restrictions, indicates a high probability of continued failure to meet restrictions.

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PALCO has admitted its own deficiency in being able to abide by restrictions on its harvesting activities. PALCO's president, John A. Campbell, told state legislators that logging laws are tough to interpret in the woods. He said, "I just want people to keep in mind how difficult it is for a young man driving a bulldozer in the field to understand all these regulations." Indeed, we should keep this in mind. If the environment can only be protected by restrictions that are too difficult for PALCO to obey, then it should not be allowed to continue these practices. Furthermore, by its very nature, any clearcutting where it is prohibited causes immediate, drastic, and irreparable harm. In addition to the immediate damage to the forest and wildlife habitat, there are long-term and secondary adverse effects of permanent loss of endangered species, soil erosion and landslides. Seven homes have been destroyed by a landslide resulting from a PALCO clearcut, and PALCO has refused to accept any responsibility for compensating for the damage.

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11. As noted in Comment 4, the current review procedures and time restrictions for THPs prevent effective regulatory oversight and input to ensure that the HCP will be implemented with adequate environmental protection. One of the obligations of regulatory agencies is to "determine that all permit issuance criteria are satisfied, and all other applicable legal requirements are met" (EIS, p. 1-16). While PALCO is supposed to agree to monitor its activities for implementing the HCP and other permits, it cannot be supposed that self-monitoring will be effective, especially considering PALCO's past record. The HCP and any associated permits or agreements should be conditioned to specify longer review times for THPs to allow more reasonable review and response times for the RWQCB, CDFG, and other responsible agencies. In addition, the CDF should not be allowed, as under current FPRs, to overrule RWQCB and CDFG recommendations on THPs. Because ITPs are administrative decisions not dependent on the legal constraints of FPRs, it appears that the federal government, if not the state government, would have the legal authority to condition ITPs upon more reasonable THP procedures if this is essential to carry out the legislative intent of ITPs. The California statutes allow PALCO to agree to longer review times, so it appears that the HCP and related permits could make this a condition.

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12. Because there are many issues that are left unresolved in the HCP and EIS and many approvals subsequent to approval of the HCP and EIS, the HCP should include a condition to allow designated public interest environmental groups to have the authority to participate in the THP interagency review teams and make recommendations, to participate in pre-harvest inspections, to participate in the development of site-specific prescriptions for watercourses, to participate in the peer review process by FWS and NMFS to evaluate the prescriptions for watercourses, to have unrestricted access on PALCO's property to observe harvesting operations and inspect areas before and after logging to document compliance with the HCP and permits and the short- and long-term effects of logging operations. As noted in comment 4, there is a demonstrated lack of resources or intent of regulatory agencies to monitor and enforce adequately the requirements imposed on PALCO. Private efforts are necessary. Members of the public have observed illegal activities on the part of PALCO and have provided useful public information that regulatory agencies have been unable or unwilling to provide. However, they have taken a risk of arrest and even torture to do this because of trespass laws. Such arrests and tortures and exclusion of public interest groups from direct participation in the decision-making process have seriously damaged the credibility of regulatory agencies, especially CDF. There should be a legal presence of independent participants and observers in the regulatory process and field monitoring. The lack of free access of

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independent observers has contributed to PALCO's many violations of FPRs and THPs and will continue to do so. Candidates for such independent participants or observers include Earth First!, Sierra Club, Natural Resources Defense Council, Rainforest Action Network, American Rivers, Environmental Defense Fund, and Environmental Protection Information Center.

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One of the purposes and needs for the actions called for in the HCP and EIS is to reduce public controversy regarding PALCO's management of its timberlands (EIS, p. 1-16). While allowing public interest group participation and observation will not ensure against future controversy, especially if the HCP and EIS are approved in their current, deficient forms, at least it would guarantee public access to information and the decision-making process and help reduce some of the needless arrests and confrontations that have occurred on PALCO property.

13. One of the requirements for issuing an ITP under state and federal law is that the applicant has ensured that adequate funding will be provided to implement the measures proposed in the HCP (EIS, pp. 1-8, 1-12). The only assurance that PALCO is providing for adequate funding is an annual budget to be reviewed by the regulatory agencies (see the Draft Implementation Agreement, in the HCP, v. VI, Part D, Section 3.3). PALCO will incur obligations extending for years beyond any given year under review. This includes replanting, road maintenance, and water quality and wildlife monitoring.

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There is serious concern that PALCO could abandon its obligations at any time, leaving significant, unmitigated damages that would have to be corrected by the government or a future landowner without the financial resources. This would be the equivalent of the legacy of abandoned mining operations throughout this state. A precedent has already been set by Louisiana-Pacific, which abandoned Mendocino County after similarly intensive logging operations that left serious environmental damage and a diminished economic base. That PALCO would do the same thing is not a remote possibility. Its owners Maxxam Corporation and Charles Hurwitz left USAT in ruins for the government to salvage (see Comment 2). The HCP anticipates intensive logging in the first two decades far below sustained yields, leaving recovery for the later decades. This plan presents a strong warning that PALCO intends immediate profit-taking while delaying its long-term commitments, with the possibility of avoiding them entirely by declaring bankruptcy or selling off the remains.

The Implementation Agreement should include provision of a trust fund, not invested in any institution with any financial relationship with Maxxam, Hurwitz, or related firms. PALCO should make a deposit in the trust fund to cover all future activities stemming from each harvest. An independent trustee should manage the fund and CDF should monitor the fund and have the power to control withdrawals to ensure they are for authorized purposes. CDF should also have the power to impound sales revenue should the fund become insufficient to maintain the long-term obligations. These provisions should be specified in the HCP.

14. The emphasis on habitat retention is on Covered Species only. There is no attempt to maintain a viable forest with species diversity and abundance approaching a natural condition. Outside of protected zones, the harvest areas are all being converted to monoculture tree farms through widespread clearcutting after which vegetation competing with rapid tree growth is intentionally destroyed by burning or herbicides. California's Forest Practice Act requires consideration of a broad range

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of environmental values, including range and forage, watersheds, and aesthetic enjoyment. Further, CEQA and FPRs require that CDF not approve a project as proposed if there are feasible alternatives or feasible mitigation measures available which would lessen the significant environmental effects of the project (EIS, p. 1-10). Alternative 3 was determined to be environmentally superior to other alternatives (EIS, p. 2-74). This alternative is similar in nature to the silvicultural practice of PALCO under its previous ownership (EIS, p. 2-7). Thus, it is known that Alternative 3 is feasible and can sustain a profitable enterprise and employment base. There appears to be no reason why CDF should not mandate an alternative similar to Alternative 3 with predominantly selective harvesting.

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15. A requirement of the California Endangered Species Act is that CDFG may authorize a take of endangered or threatened species if all required measures are capable to successful implementation (EIS, p. 1-12). There is serious doubt that PALCO will fulfill the required measures, due to the factors discussed in Comments 1-6 and elaborated in other comments herein. On these grounds, there does not appear to be a legal basis to authorize take.

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16. A requirement of the Endangered Species Act is that impacts of the proposed taking will be minimized and mitigated to the maximum extent practicable. In addition, the HCP must specify alternatives to the proposed taking that were considered and rejected and the reasons why they are not proposed to be utilized (EIS, p. 1-8). Alternative 3, Selective Harvest, was analyzed and rejected. The comparison of alternatives found Selective Harvest to be superior to the Proposed Action (EIS, p. 2-74) in terms of preserving habitat for the Covered Species, in addition to other environmental benefits. The reasons for not selecting Alternative 3 are insubstantial or questionable with one exception (HCP, v. 1, pp. 40-41). The most credible statement in the entire HCP is that Selective Harvest "would also have a significant negative economic impact on PALCO." Selective Harvest was demonstrated to be economically viable by PALCO's prior ownership. The only valid reason for abandoning selective harvest is that it will not yield outrageous profits at the expense of the environment and the long-term economy of the region. There is no obligation under ESA to guarantee a landowner large profits. Furthermore, the mitigation measures under Alternative 2 are predicated on weak-to-nonexistent data, poor if not invalid assumptions to model forecasts, questionable compliance by PALCO, and questionable monitoring and enforcement by regulatory agencies. There does not appear to be sufficient legal basis for federal approval of an ITP under Alternative 2.

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17. There appears to be no scientific basis for having interim RMZ prescriptions that are more lenient than the default prescriptions (EIS, pp. 2-29 ff). Within four years PALCO plans to harvest 25 percent of its property. Thus, much of the acreage will not be subject to default prescriptions nor watershed analyses. It can also be presumed that PALCO will tend to harvest first the area containing the most valuable timber, which would also tend to have the highest habitat value. Interim and default prescriptions should be identical and based on the best scientific knowledge. Table 2.5-3b has an error, both categories applying to "Slopes greater than 50 percent". Appendix E, Part 2 of EIS also has problems: it is difficult to correlate the four columns and for Class II, there does not appear to be a category for slopes less than 50 percent for Option 2, Band 1. (The corresponding table in the HCP, v. IV, Part D, Section 3 is no better.)

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18. One of the most severe impacts of logging is erosion and sediment runoff. It is a problem not only for wildlife, but also for stream bank erosion and flooding (EIS, p. 3.4-19). Stream aggradation has been worsening in the study area, and it appears that all major streams are sediment impaired (EIS, Table 3.4-4). This is most severe in clearcut zones. Yet, there are no prescriptions for erosion control in harvest zones, regardless of harvest method (EIS, Appendix E, Part 2, p. 11; HCP, v. 1, p. 58). Where is it anticipated that the tons of debris will go? Apparently it is expected to be captured in the RMZs, which are as narrow as 30 feet for 3,200 miles of Class III watercourses. The RMZs along Class III watercourses can be clearcut as well and have limited equipment disturbance. Even if the sediment were to be entirely captured in the RMZs, it would damage the habitat characteristics that are intended to be preserved in the RMZs. It is incredulous to believe that a significant portion of this sediment will not pass through the RMZs and reach streams and deposit in Class I and II streams of critical habitat importance. Yet, it is apparently precisely this assumption that is made to conclude that the aquatic habitat and water quality will improve under the Proposed Alternative (EIS, pp. 2-66 ff).
19. The HCP concludes that 131,791 acres have low erosion potential and 75,338 acres have only moderate potential (v. 1, p. 16). The methodology for determining this is never fully documented. It is well known that the Coastal Range has a very fragile and erosive geology. These data seem to defy common knowledge and raise serious question of their validity.
20. Table 2.6-1 of the EIS provides a very spurious comparison of alternatives for some important factors. The table concentrates on first "decade" (four years) changes for such things as timber volume harvest and employment. Both of these factors are favorable to the Proposed Action (Alternative 2) in the early portion of the planning period. Long-term productivity, however, is expected to decline for the Proposed Action, resulting in economic depression. Based on this biased and selective presentation of data, Table 2.6-2 and the discussion later conclude that the employment impact is less than significant for the Proposed Action and significant for Selective Harvest (Alternative 3). Apparently PALCO has proposed to maintain employment by purchase of timber from non-PALCO property, in effect robbing other areas of employment and still leaving the California economy worse off. This presumes that PALCO will follow through. Its current practice is to lay off employees immediately upon any work slowdown, and its parent Maxxam completely abandons its obligations once its profit potential declines. These long-term social impacts are supposed to be addressed in the EIS.

The impacts on wildlife in table 2.6-2 are also spurious for the Proposed Action, because they are based on insufficient baseline data and improbable assumptions for projections. In particular, the assumptions on sediment loading in streams appear to be incredibly optimistic and no sensitivity analysis was performed to test the impact of incorrect assumptions.

I was unable to read the entirety of the two subject documents. However, I am an engineer having extensive experience with regulatory agencies, state and local governments, and administration of contractual agreements. I find the portions of the documents I have read to have the possibility of resulting in massive environmental damage based on weak baseline data, biased assumptions and forecasting models, and a weak to nonexistent regulatory monitoring and enforcement framework. Furthermore, the No Surprises Rule severely constrains changes to compensate for these

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weaknesses as time passes. Rather than anticipating these weaknesses by basing prescriptions on worst-case assumptions, they are based on PALCO's best-case assumptions. Under the circumstances, unless substantially redrafted, both documents should not be approved. However, the documents represent a strong alert that maintaining the current approach to approving THPs is also severely damaging, and a substantial overhaul of the THP process is also in order.

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Sincerely,

Richard A. Mills

Richard A. Mills, P.E.